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COMMENT: PENNIES FOR THEIR THOUGHTS?:

THE VALUE OF WRITERS' DIGITAL RIGHTS

Emily Bass[†]

First of all, let me thank Craig Nard for inviting Professor O'Rourke and me for what I think was a truly marvelous symposium. A year ago when Professor Nard asked me to come and be a commentator here, I was delighted. I felt I had a tremendous amount to say. A month ago when I received Professor O'Rourke's paper, I felt stymied. The only thing that I could think of to do was to stand up and say, "I agree with absolutely everything Professor O'Rourke has said," and then sit down. That did not strike me as a very constructive thing to do. It then occurred to me that the contribution I could make to the discussion would be to add a historical perspective. What I mean by that is a perspective on how our world has changed over the last ten or maybe twelve years with the advent of the Internet. How the Internet has changed how we function in the world, and how it has affected the issues we are discussing here today. Specifically I could help answer the question of how the application of copyright principles affects the day-to-day life of freelance writers.

When I came up with the underlying theory for the *Tasini* case¹ a little over ten years ago, there were only several hundred thousand people using the Internet. I know it is difficult for us today to recognize how few people were on it back then, but it is true. In fact, not one of the plaintiffs in the *Tasini* case was on the Internet at the time, and that included the lead plaintiff, Jonathan Tasini, even though he was the head of a major writers' organization, the National Writers Union. Their lawyer – me – was not even on the Internet. Indeed, although I had two computers in my office, they were not even hooked up together. Instead of being

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¹ *New York Times Co. v. Tasini*, 533 U.S. 483 (2001).

networked, they operated on what I shall refer to as the “sneaker net” principle. When I wanted to copy a document from one computer to the other, I had to put a disk in the A drive of one computer, download the document, and then tiptoe over to the other computer in my sneakers and upload the document onto the other drive. In fact, when I wanted to investigate the technology that was at the heart of the case – and that we feared infringed freelance writers’ rights – I had to go to the New York public library and sign up in fifteen-minute increments to get access to the databases we were focusing on.

We brought the *Tasini* case ten years ago because we imagined that at some point down the road “digital rights” or “electronic rights” would be important to society, and of significant value to freelance authors. In the first respect at least, I think we turned out to be correct. Today there are between 450 and 550 million people on the Internet, and by 2004, 750 million people are expected to be on-line. That represents a two thousand-fold increase over the number of people on the Internet a decade ago. So the question becomes: What has the advent of this brave new digital world of ours and this explosion in technology meant for copyright law, and for those who depend on copyright law to make a living? What has it enabled those who distribute information to be able to do? And, how has it impacted both on the ability of freelance authors to market their work and to make a living?

To answer these questions, we have to distinguish between two types of situations. One is the situation in which a work that a freelance author generates is a stand-alone work – like an article, a story, a commentary in a newspaper, a photograph, or a graphic. That is, a work that can be considered complete in and of itself. The second is the situation in which a work serves as an introduction to a more substantial work. An example of the latter would be a book excerpt, which is published in a magazine or journal. The freelance author hopes it will induce the reader to go out and purchase a copy of his full-length novel or treatise. Digitization impacts each of these works in a different way. I suspect that today we will only have the opportunity to discuss how digitization impacts the first type of work – i.e., the article. In that case, my experience is that freelance authors typically make their living by selling rights in the articles they generate to multiple publications, each of which serve a distinct geographic region. So, it is not simply that after publishing an article in the *Chicago Tribune*, for instance, that a freelance author then has the right, or the ability and the incentive, to publish that same article in an anthology or to turn

it into a treatment for a movie. The freelance author makes his or her living by selling that article to five or six different publications throughout the United States. So, for instance, the author who sells first North American serial rights to the *Chicago Tribune* will then typically sell re-use or reprint rights to four or five other newspapers. He might, for instance, sell re-use rights to publications in Boston, Philadelphia, Atlanta, and Los Angeles.

From the author's perspective, the economics of the situation are as follows: Although he or she puts in fifty hours writing the article, he anticipates licensing the article to five or six different publications. Assuming he is able to command a fee of \$400 for his article – and the assumption is a modest one – he expects to get a return of at least \$2000 for his fifty hours of labor. And after self-syndicating his work within the United States, he would still have the right and ability, if his article was of interest to a foreign market, to sell the right to publish the article in Europe, in Latin America and in Asia.

Beginning in 1995, many publications throughout the United States, and I am principally talking about newspapers, started demanding at the point of sale that freelance authors give up “all rights,” or at the very least that, in addition to licensing “first publication rights,” they also give the publishers electronic or digital rights. To the extent that freelancers consented, this enabled publishers for the first time to begin, legitimately, placing the entire contents of their periodicals online, onto the Internet and onto CD-ROMs, including the freelance works. This transformed the economics of freelancing as follows: Now, the freelance author sitting in Des Moines who wrote an article for the *Washington Post* at the very least gave the *Washington Post* not only first North American serial rights but also electronic rights as well. As a result, within twenty-four hours of his article's appearing in one locality in print, it also appeared and was available electronically *worldwide*. When the freelance author then made the same rounds he had been making for the last fifteen to twenty-five years – i.e., going to Boston and Houston and LA and Atlanta – he found that publications were no longer interested in purchasing re-use rights to his articles. After all, why would a publisher or an editor who knew that an article was already available on the Internet and had likely been accessed by some of his readers want to pay for the right to re-print that article in his magazine or newspaper? He would not. He would reject any article that had already appeared on-line as “yesterday's news” and unworthy of further publication.

The end result of this process is that the immediate exercise of digital rights by the first-line publisher destroys the secondary market for the freelance author. So, the freelance author still puts in fifty hours writing his article, but instead of selling it five or six times – or to five or six different publications – he can only sell it once to the publisher of first instance. And, while one might have thought that a publisher who paid \$400 for first North American serial rights alone would pay at least an additional \$1600 for a right that enabled it to cover “four plus” other major markets, that has not been the case. With a few notable exceptions, a number of which have been noted in Professor O’Rourke’s article,² I am told that most publishers have been refusing to pay a cent more for a print-plus-digital-rights package than they originally paid for first publication rights alone. I personally find this both astonishing and offensive. After all, in the case of first North American serial rights, what the newspaper publisher was effectively paying for was the right to include an article in a collective work that had a shelf life of only twenty-four hours. In the case of digital rights, on the other hand, in a very practical sense what the publisher is obtaining is a right that effectively lasts in perpetuity.

Notwithstanding this disparity, many publishers are now paying no more for an “all rights” contract or a package that effectively gives them perpetual rights than they paid for a “first” right or “one-time right” that expired in twenty-four hours. What is more, some publishers have said to their freelance authors, unless you agree to this arrangement, you will no longer write for this publication. Now, that is not true of all publishers. That is not true in all instances, but I think that that has been said a sufficient number of times that it has led many freelancers to believe that they have absolutely no option. Professor O’Rourke referred before to a blacklist. At one point during this litigation, there was a publication that internally circulated a list of freelance authors whom it suggested editors should not hire. On that list was every freelance author who was a plaintiff in the original *Tasini* litigation and, I believe, every named plaintiff in the class actions that followed on the *Tasini* victory in the United States Supreme Court.

So there clearly is, as Professor O’Rourke has said, a problem. And a paradox. On one hand, the United States Supreme Court has said in unequivocal terms that digital rights belong to the freelance author and are his to exercise unless he or she consents to transfer or license them. On the other hand, there is the practical

² Maureen A. O’Rourke, *Bargaining in the Shadow of Copyright Law After Tasini*, 53 CASE W. RES. L. REV. 605, 606 fn. 3 (2003).

question of whether freelance authors can manage to hold on to their rights and, even if they can, whether they can then realize their value.

In her article, Professor O'Rourke discussed three corollary questions: First, whether there is any way to enable freelance authors to preserve their digital rights, that is, to avoid having to give them up. Second and alternatively, whether there are any grounds upon which to set aside "all rights" contracts or coerced "digital rights" contracts. Third, assuming freelance authors can manage to hold on to their rights, how can they best maximize their value. In addition to discussing these theoretical questions, she also examined and discussed three strategies for achieving those goals. First, using contract law to challenge all rights contracts. Second, creating collective rights organizations along the ASCAP, BMI, or SESAC model in order to increase authors' leverage. And, third, lobbying for legislation such as the Conyers bill which would exempt freelance authors from antitrust laws and pave the way for them to organize.³

In my view, Professor O'Rourke correctly analyzed the likelihood of success of each of those three strategies. I agree with her that it is unlikely that the courts are going to strike down contracts that operate prospectively, that is, that give publishers "all rights" or electronic rights going forward – either on the basis of an adhesion contract or unconscionability analysis. The only contract-law-based challenges that I think will prevail are those that are leveled against retroactive rights clauses. In other words, I do think that publishers that have acted in bad faith or are demanding rights back to articles written for them years ago are going to find many of their "retroactive rights" clauses stricken. Similarly, while I believe that the writers organizations are to be commended for having set up collective rights organizations, I agree with Professor O'Rourke that, unless someone can come up with a mechanism to ensure that freelance authors can retain their rights, there is going to be nothing for them to license to collective rights organizations, and nothing for those organizations to administer. The only things they may find themselves administering are the rights to pre-1995 articles. And, even those may end up in publishers' hands.

Third, I agree with Professor O'Rourke regarding the Conyers bill. It is an important first step. Even a necessary step, but not a sufficient one. Unless those who are fighting for the Conyers bill

³ *Id.*

fight for further legislative protections, they are going to find that the antitrust exemption they win provides them little solace. I believe that freelance authors need legislation that clearly recognizes their right to join and form collective organizations, and that would: (1) require publishers to recognize and bargain in good faith with representatives of the freelance authors' choosing; (2) require publishers to negotiate in good faith over specific and mandatory subjects of bargaining; and (3) make secondary rights, in general, and digital rights in particular, a mandatory subject of bargaining. If it follows the pattern in other industries and the private sector in general, such legislation could treat a refusal by publishers to recognize a union, to bargain in good faith, or to reduce agreed-upon terms to writing as an unfair labor practice.

There are three additional strategies besides those discussed by Professor O'Rourke that I think are worth consideration. Since I am running out of time, I am simply going to mention them. At least one of them will be the subject of considerable discussion this afternoon. While contract law may not provide a vehicle for challenging some of the terms that publishers have insisted on, in my opinion, I think that "tying law" just might provide such a vehicle. While I am not an antitrust lawyer, it seems to me that freelance authors have what one might call a "reverse tying claim," or derivative tying claim. Generally a tying arrangement occurs when a party is willing to sell one product, called the tying product, only if the buyer also purchases a second product, called the tied product. Here what you have is the reverse. The publishers will only purchase first publication rights, i.e., the tying product, if freelance authors will also sell them digital or electronic rights, i.e., the tied product. Viewed from this perspective, in my opinion, essentially all five elements that must be present in order to establish a tying claim are present here. One, there is both a tying product and a tied product. Two, there is evidence of publishers forcing freelance authors to sell the tied product together with the tying product. Three, there is evidence that publishers have sufficient economic power in the tying product market, that is in the print newspaper market, to coerce freelance authors into agreeing to sell digital rights. Four, there is a substantial amount of interstate commerce in the tied market. And, five, there is evidence of anti-competitive effects in the tying market.

The two other strategies that I think are worth consideration and at some point discussion are: (1) a compulsory licensing scheme; and (2) a Works Progress Administration-type of subsidy program. Indeed, in its *Tasini* decision, the Court suggested that

something along the lines of a mandatory licensing scheme ought to be considered on remand by the lower courts. The Court did not utilize the phrase "compulsory licensing scheme," but it talked about leaving it to the parties and, if necessary, the courts and Congress to "draw on numerous models for distributing copyrighted works and remunerating authors for their distribution."⁴ Many people, myself included, believe that they were suggesting that a compulsory licensing scheme should be considered. I have serious doubts that such a scheme could be imposed by the courts alone. Like the United States Supreme Court, however, I have no doubt that such a system could be fashioned with Congress' help and made the law of the land. I think it should be.

Finally, I believe that something along the lines of the WPA or Works Progress Administration Project should be considered to subsidize authors who make their published works available for on-line distribution. If access to the complete "digital record" is really as important to the public welfare as publishers and historians have been suggesting now for several years, then there is no reason why public funds should not go to compensate freelance authors for their digital rights. Thank you very much.

⁴ *Tasini*, 533 U.S. at 505.

